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Nos. 82-1248, 82-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, as Attorney General of the State of New York,

Appellants,

-v.-

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLANT SCHALL

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Question Presented

Section 320.5(3)(b) of the New York Family Court Act authorizes the pretrial detention of a juvenile upon the Family Court's statement of facts and reasons for finding that, unless the juvenile is detained, there is a serious risk that he may, before the return date of the fact-finding hearing (*i.e.*, trial), commit an act which, if committed by an adult, would constitute a crime. The question presented is:

Whether section 320.5(3)(b) comports with the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

Parties

This proceeding was originally commenced against the Director of Detention Services of the New York City Human Resources Administration, Robert K. Davis, the official then having custody of juvenile pretrial detainees. By stipulation of the parties, the Commissioner of the New York City Department of Juvenile Justice was substituted as respondent when that Department was given responsibility for those detainees. Ellen Schall formally assumed the position of Commissioner on January 20, 1983. She has therefore been substituted in the caption for the former Commissioner, Paul Strasburg, whose name appeared in the caption in the District Court and the Court of Appeals. *See* Rule 40.3 of the Rules of this Court.

The Attorney General of the State of New York, Robert Abrams, intervened in the District Court pursuant to his obligation to support the constitutionality of State statutes. New York Executive Law, § 71 (Book 18, McKinney's Consolidated Laws of New York).

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BRIEF FOR APPELLANT SCHALL

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, which is reprinted in the Joint Appendix at page 95, is reported *sub. nom. Martin* v. *Strasburg* at 689 F. 2d 365. The concurring opinion of Circuit Judge Newman is reprinted in the Appendix at page 116 and appears in the reporter at 689 F. 2d 375.

The opinion of the United States District Court for the Southern District of New York (Carter, D. J.), which is reprinted in the Appendix at page 36 is reported *sub. nom. United States ex rel. Martin* v. *Strasburg* at 513 F. Supp. 681. An earlier decision of the District Court denying a motion to dismiss for failure to exhaust administrative remedies and certifying the matter as a class action, which is dated April 3, 1978 and appears in the Appendix at page 20, is unreported.

Jurisdiction

The judgment of the United States Court of Appeals was entered on September 20, 1982. A timely notice of appeal to this Court was filed in the Court of Appeals on behalf of the Commissioner of the New York City Department of Juvenile Justice on December 8, 1982. Pursuant to an order of Justice Marshall, dated December 10, 1982, granting an extension of time to docket the appeal, appellant Schall's jurisdictional statement was timely filed, and the appeal was docketed, on January 24, 1983.[1] Probable jurisdiction was noted by this Court on April 18, 1983, and this case

[1] Justice Marshall's order granted an extension of time to January 23, 1983, a Sunday. Appellant Schall's jurisdictional statement was served and mailed to the Court on the following Monday, January 24.

was consolidated with case no. 82-1278, *Robert Abrams, as Attorney General of the State of New York* v. *Gregory Martin, et al.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C., section 1254(2).

Statute Involved

New York Family Court Act, section 320.5 (McKinney's Consolidated Laws of New York—Interim Annotation Service, April 1983)[2]

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[2] Petitioners' challenge was to the constitutionality of section 739(a)(ii) of the New York Family Court Act, which, at the time of the commencement of this proceeding, was the statute governing the pretrial release or detention of both alleged juvenile delinquents and persons in need of supervision. However, on December 20, 1982, the Governor of the State of New York signed a bill amending the Family Court Act. L. 1982, ch. 920, as amended. The new statute, which became effective on July 1, 1983, established a new Article 3 of the Act, denominated "Juvenile Delinquency". The provisions of Article 3 are applicable, *inter alia*, to "all juvenile delinquency actions and proceedings commenced upon or after the effective date thereof and all appeals and other post-judgment proceedings relating or attaching thereto" and "all juvenile delinquency actions and proceedings commenced prior to the effective date thereof but still pending on such date". FCA, § 301.3(1)(a) and (2)(a). Article 7, which, until July 1, governed both delinquency proceedings and proceedings concerning persons in need of supervision, now covers only the latter. Former section 739(a)(ii) is set out in appellant Schall's jurisdictional statement, pages four through six, to which the Court is respectfully referred.

The new Article contains a preventive detention section identical to former section 739(a)(ii). As a comparison of the two sections demonstrates, the relevant standard for detention, "serious risk that the respondent may before the return date commit an act which if committed by an adult would constitute a crime," remains the same. The issue of mootness is discussed in subpoint I of the Argument.

§ 320.5. The initial appearance; release or detention

1. At the initial appearance,[3] the court in its discretion may release the respondent or direct his detention.

• • •

3. The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:

(a) there is a substantial probability that he will not appear in court on the return date; or

(b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.

Statement of the Case

Proceedings Below

This proceeding was commenced in the United States District Court for the Southern District of New York by three juveniles (hereinafter, "the petitioners"),[4] on behalf

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[3] Section 320.1 of the Family Court Act defines "initial appearance" as "the proceeding on the date the respondent first appears before the court after a petition has been filed and any adjournments thereof".

[4] Appellees in this Court.

The original petition was filed on December 21, 1977 on behalf of Gregory Martin and the class he sought to represent. At that time, Gregory was being detained pursuant to section 739(a)(ii) following a "section 739 hearing" held on December 14, 1977. Probable cause had been found at a hearing on December 19, 1977. After a fact-finding hearing on December 27 through 29,

(Footnote continued on following page)

of themselves and all others similarly situated, for a writ of habeas corpus and a declaratory judgment. Jurisdiction was invoked under 28 U.S.C., sections 2241 *et seq.* and 2254; 28 U.S.C., section 2201; and Rule 57 of the Federal Rules of Civil Procedure (JA: 9).[5] Petitioners alleged that, since section 739(a)(ii) of the New York Family Court Act (hereinafter, "FCA") violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, their pretrial detentions pursuant to that statute were unlawful.

In an opinion and order dated April 3, 1978, the District Court, on petitioners' motion, certified the action as a class action, defining the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under §739(a)(ii) of the [Family Court] Act" (JA: 32). Following a trial on the merits,[6]

(Footnote continued from preceding page)

1977, Gregory was found guilty of all acts charged; at the conclusion of his dispositional hearing on February 14, 1978, he was placed on probation for two years. In an amended petition dated March 31, 1978, Luis Rosario and Kenneth Morgan, two juveniles then being detained pursuant to section 739(a)(ii), were added as named petitioners. The District Court certified the class in an opinion and order dated April 3, 1978 (Joint Appendix: pp. 30-32). *See Gerstein* v. *Pugh*, 420 U.S. 103, 110 n. 11 (1975); *see also United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 397-401 (1980).

[5] Page numbers preceded by "JA" are references to pages of the Joint Appendix filed on this appeal.

[6] In this regard, the Court is respectfully referred to the Statement of the Case in the brief of the appellant Attorney General of the State of New York, submitted on the companion appeal, *Abrams* v. *Martin*, no. 82-1278 (hereinafter, "the Attorney General's brief").

the District Court, in a judgment entered June 1, 1981, declared FCA, section 739(a)(ii), "unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States". The Court also granted writs of habeas corpus, ordering that "all members in [the Commissioner's] custody pursuant to Family Court Act Section 739(a)(ii) shall be released forthwith" (JA: 93).[7]

In its opinion, the District Court concluded that petitioners' equal protection challenge to the statute was "insubstantial" (JA: 67). The Court, however, did find that FCA, section 739(a)(ii), violated the Due Process Clause of the Fourteenth Amendment in three particular respects. The "most pernicious" defect in the statute, the Court concluded, was the fact that, while it empowered judges to make predictions about the probability of an individual committing a crime if released, it provided no guidelines for making that determination. "The judge's determination is moored to no concrete or reasonably determinable yardsticks.... The whole process is riddled with subjectivity and caprice and confers upon the judge 'a license for arbitrary procedure'" (JA: 69-70). The predictions involved in bail and sentencing proceedings were distinguished by the Court on the ground that the courts in those situations made the determinations upon "all possible relevant information about the defendant" (JA: 82). On the other hand, the Court found, a Family Court judge making a determination under section 739(a)(ii) "operate[d] on intuition and his personal predilections, the antithesis of rea-

[7] In a post-judgment clarifying memorandum to all counsel, the District Court explained that "[the] writ reaches all detained juveniles held under the relevant act until this proceeding is concluded or the judgment entered is reversed" (JA: 94).

soned action" (JA: 83). Thus, juveniles who were detained under section 739(a)(ii) "ha[d] their freedom curtailed by judgments that [were] untrustworthy and uninformed and without the requisite rationality which due process mandates" (JA: 81).

Second, the District Court held that "pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process" (JA: 69). Finally, section 739(a)(ii) was constitutionally defective since it permitted the imposition of punishment prior to an adjudication of guilt (JA: 88). The Court found that the section's purpose, the protection of society from juveniles' criminal conduct, was not sufficiently distinguishable from the purposes of the juvenile justice system as a whole to constitute an "alternative purpose" under *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). Even assuming the adequacy of the alternative purpose, "the inability of trial judges to predict which juveniles will commit crimes ... means that any given decision to detain cannot 'rationally be connected' with the purpose behind it" (JA: 90). The Court also determined that "the stigmatizing of juveniles as prospective or habitual criminals prior to trial is such a departure from basic principles of due process that it 'appears excessive' even in relation to the goal of protecting society" (JA: 90).

Upon the appeals of the Commissioner and the Attorney General to the Court of Appeals, only the District Court's finding that FCA, section 739(a)(ii), violated the Due Process Clause was presented for review.[8] "[I]ntimat[ing] no view as to the constitutionality of preventive detention in

[8] Petitioners' equal protection claim, which, as noted, was rejected by the District Court, was neither raised in, nor decided by, the Court of Appeals.

other circumstances" (JA: 114), the Court of Appeals held that "the statutory scheme and practice under it violate[d] the Due Process Clause of the Fourteenth Amendment" (JA: 97) since section 739(a)(ii) "[was] utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts" (JA: 111).

Finding that over two-thirds of the detainees under section 739(a)(ii) were either "not ... adjudicated guilty or [were] not ... sentenced to confinement after an adjudication of guilt" (JA: 114), the Court determined that the statute had "an unconstitutional impact as to the vast majority of the juveniles detained under it" (JA: 113) since such detentions "involve[d] either mistakes in judgment fostered by 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punishment for unadjudicated crimes" (JA: 112). The Court thus concluded that, as to this "vast majority", "[c]rime prevention simply [did] not provide justification for the[ir] detention" (JA: 111). Having so found, the Court held that FCA, section 739(a)(ii), was unconstitutional as to all juveniles (JA: 113).

Judge Newman, concurring only in the result, was "less certain than the majority that the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment" (JA: 117). In Judge Newman's view, "the statute denies due process ... not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results" (JA: 117-18).

Utilizing a "[t]raditional due process analysis" (JA: 118) (*see Mathews* v. *Eldridge*, 424 U.S. 319 [1976]), Judge Newman found that the private interest impaired by sec-

tion 739(a)(ii), *i.e.*, personal liberty, "was of fundamental importance" (JA: 118), and that the governmental interest involved, *i.e.*, the prevention of crime, was "of great significance" (JA: 118). The Judge then noted that "the uncertainty in determining whether [a person's] pre-trial detention advances a governmental interest arises from the difficulty of predicting whether he would have committed a crime if not detained, or assessing at least the probability of his doing so" (JA: 119). Turning, then, to the third due process factor, "the risk of an erroneous deprivation and the probable value of safeguards" (JA: 119), Judge Newman concluded that section 739(a)(ii) "[did] not include readily available limitations that would reduce the risk of error" (JA: 121). The Judge listed five such limitations (JA: 121-22):

> "First, the statute places no limits on the crimes for which the person subject to detention has been arrested.... Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused.... Third, the judge is not required to assess the individual's background .... Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released.... Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime."

Brief Summary of Statutory Scheme (New York Family Court Act, Article 3—Juvenile Delinquency)[9]

A child in New York under the age of 16 may be taken into custody without a warrant by a peace officer or a police officer in cases in which an adult may be arrested for a crime. FCA, § 305.2(2); *see also* FCA, § 305.1.[10] Upon taking a child into custody, the officer must immediately notify the parent or other person legally responsible for the child's care, or, if such legally responsible person is unavailable, the person with whom the child resides,[11] that the child has been taken into custody. FCA, § 305.2(3). While release of the child to his parents is preferred (FCA, § 305.2[6]; *see* § 305.2[4][a]), if "special circumstances" are present (FCA, § 305.2[6]), the child may be taken directly to Family Court or to a juvenile detention facility, or

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[9] The procedures prescribed by the new Article 3 of the Family Court Act are essentially similar to those prescribed by former Article 7. For a summary of the Article 7 proceedings concerning juvenile delinquents, the Court is respectfully referred to appellant Schall's jurisdictional statement, pages 13 through 21.

[10] A child may also, of course, be taken into custody pursuant to a warrant.

A "juvenile delinquent" is a person over seven and less than 16 years of age who, having committed an act that would constitute a crime if committed by an adult, is not criminally responsible for such conduct by reason of infancy. FCA, § 301.2(1).

A "crime" is defined in New York Penal Law, section 10.00(6) (Book 39, McKinney's Con. Laws of N.Y.), as a felony or a misdemeanor.

[11] Unless otherwise indicated, a reference to "parent" throughout this brief includes the modifying phrase "or other person legally responsible for the child's care, or if such legally responsible person is unavailable, the person with whom the child resides".

he may be questioned by the officer "for a reasonable period of time". FCA, § 305.2(4). A child may not be questioned, however, unless both he and his parents have been advised of the child's right to remain silent, that statements made by the child may be used in court, that the child has the right to have an attorney present, and that an attorney will be appointed if the child is indigent. FCA, § 305.2(7).

Before the filing of a petition, the agency responsible for operating a detention facility is authorized, "when practicable," to release a child to the custody of his parents "unless there are special circumstances requiring his detention." FCA, § 307.3(2). If the agency does not release the child, he must be brought before the Family Court within 72 hours or the next day court is in session, "whichever is sooner" (FCA, § 307.3[4]), at which time the Court must hold a hearing "for the purpose of making a preliminary determination of whether the court appears to have jurisdiction over the child". FCA, § 307.4(1). The child and his parents are advised of the child's "right to remain silent and of his right to be represented by counsel chosen by him or by a law guardian assigned by the court". FCA, § 320.3; *see* FCA, § 307.4(3). If independent legal representation is not available, the Court must appoint a law guardian. FCA, § 307.4(2). Unless certain specified findings are made, the child is released to the custody of his parents. FCA, § 307.4(4). A child who is detained following the hearing must be released unless a petition is filed within four days of the conclusion of the hearing. FCA, § 307.4(7).

Prior to the filing of a petition, the probation service is authorized to confer with the child, the person seeking to have the petition filed and other interested persons "concerning the advisability of requesting that a petition be filed". FCA, § 308.1(1). With certain statutory exceptions (FCA, § 308.1[3, 4]), probation may then attempt to

"adjust suitable cases before a petition is filed".[12] FCA, § 308.1(2). The fact that a child has been detained prior to the filing of the petition does not preclude probation from adjusting the case. If an adjustment occurs, the child is released. FCA, § 308.1(5).

A juvenile delinquency proceeding originates with the filing of a verified petition (FCA, § 311.1[1, 4]) which contains, *inter alia*, "a plain and concise factual statement ... which ... asserts facts supporting every element of the crime charged and the respondent's commission thereof" and "a statement that the respondent requires supervision, treatment or confinement". FCA, §311.1(3)(h, j)).[13] A petition is sufficient only if (FCA, § 311.2[2, 3]):

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[12] According to a Vera Institute of Justice Study of a New York City sample of 1890 potential delinquency cases, admitted into evidence at trial, 532 (28 percent) were adjusted informally at probation intake.

Witnesses testified that a case may be "terminated without adjustment" if a complaining witness, *e.g.*, fails to appear or advises probation that he does not want to proceed. Approximately 22 percent of the cases in the Vera Study were so terminated.

[13] FCA, § 315.2(1), provides, in part:

> "A petition or any part or count thereof may at any time be dismissed in furtherance of justice when, even though there may be no basis for dismissal as a matter of law, such dismissal is required as a matter of judicial discretion by the existence of some compelling further consideration or circumstances clearly demonstrating that a finding of delinquency or continued proceedings would constitute or result in injustice...."

Also, at any time prior to the conclusion of the dispositional phase of the proceeding, the Family Court, with certain statutory exceptions, may order that the proceeding be "'adjourned in contemplation of dismissal'", an adjournment, upon conditions, for a period not to exceed six months "with a view to ultimate dismissal of the petition in furtherance of justice". FCA, § 315.3(1).

"2. the allegations of the factual part of the petition, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the respondent committed the crime or crimes charged; and

3. non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof."

After the filing of the petition, the child is brought before the Court for an initial appearance (see, FCA, § 320.1). If the child is detained, the initial appearance must be held no later than 72 hours after the petition is filed or the next day the Court is in session, whichever is sooner. FCA, § 320.2(1). At the time of the hearing, the child and his parents must be advised of the child's right to remain silent and of his right to be represented either by counsel chosen by him or by a law guardian assigned by the Court. FCA, § 320.3. The Court must appoint a law guardian if independent legal representation is not available to the child. FCA, § 320.2(2).

At the initial appearance, "the court in its discretion may release the respondent or direct his detention". FCA, § 320.5(1). The child must, however, be released if the Court cannot state "facts and reasons" for finding that "unless the respondent is detained: (a) there is a substantial probability that he will not appear in court on the return date [of the fact-finding hearing, *i.e.*, trial]; or (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime."[14] FCA, § 320.5(3). It is this latter provision,

[14] According to the testimony at trial of a judge of the New York Family Court, probation service, based on its contact with the child and others during the pre-petition adjustment stage of the proceeding, makes a recommendation as to whether the child ought to be released or detained (JA: 254).

which allows detention upon a finding of serious risk of future crime, which is challenged by petitioners and which was held invalid by the Courts below.[15] Section 320.5(3)(a), which provides for detention upon a finding of probability of flight, is not affected by the instant proceeding. The "detention hearing" will be discussed in more detail in the Argument portion of this brief.

If it is determined at the initial appearance that a child is to be detained for more than three days pending a fact-finding hearing, the Court is required to schedule a probable cause hearing, which must be held within three days of the initial appearance.[16] FCA, § 325.1(1, 2). At the hearing, the presentment agency[17] is enjoined by statute to "call and examine witnesses and offer evidence in support of the charge". FCA, § 325.2(1)(a). The child may testify on his own behalf as a matter of right. If he chooses

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[15] Petitioners challenge only the detention authorized by section 320.5(3), *i.e.*, post-petition, pre-fact-finding detention. The pre-petition detention and any detention following the fact-finding hearing but prior to the dispositional hearing are not involved in this proceeding.

[16] "For good cause shown, the court may adjourn the hearing for no more than an additional three court days." FCA, § 325.1(3). The initial three day detention period is inclusive of Saturdays, Sundays and public holidays. *Matter of Kenneth D.*, 102 Misc 2d 363, 423 N.Y.S. 2d 423 (Fam. Ct., Kings Co. 1979).

If a timely probable cause hearing cannot be held "the Court may dismiss the petition without prejudice or for good cause shown adjourn the hearing and release the respondent". FCA, §325.3(4).

[17] The "presentment agency" is the agency or authority which, under the Family Court Act (*see* §§ 254, 254-a), "is responsible for presenting a juvenile delinquency petition". FCA, § 301.2(12).

to do so, his testimony may be used in future proceedings only for impeachment purposes. FCA, § 325.2(1)(b). Upon the request of the child, the Court shall, except for good cause shown, permit him to call and examine other witnesses or produce other evidence on his own behalf. FCA, § 325.2(1)(c). Each witness called must testify under oath unless he would be authorized to give unsworn testimony at a fact-finding hearing.[18] All witnesses, including the child if he testifies, may be cross-examined. FCA, § 325.2(2).

With certain limited statutory exceptions, only non-hearsay evidence is admissible at the hearing. FCA, § 325.2(3). At the conclusion of the hearing, the Court is required to determine whether it is reasonable to believe that a crime was committed and that the child committed it.[19] FCA,

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[18] See FCA, § 343.1(2):

> "Every witness more than twelve years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath. If the court is not so satisfied, such child or such witness over twelve years old who cannot, as a result of mental disease or defect, understand the nature of an oath may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof."

[19] Section 70.10(2) of the New York Criminal Procedure Law (Book 11A, McKinney's Con. Laws of N.Y.) provides:

> " 'Reasonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it."

§ 325.3(1). Upon so finding, the Court must also determine whether continued detention is necessary. FCA, § 325.3(3). If the Court cannot find the requisite probable cause, "the case shall be adjourned and the respondent released from detention". FCA, § 325.3(4).

The next stage in the judicial process is the fact-finding hearing, which, if the child is in detention, must commence no more than three days after the conclusion of the initial appearance.[20] FCA, § 340.1(1). The purpose of this hearing is to determine whether the child "committed an act or acts which if committed by an adult would be a crime". FCA, § 342.2(2). Only evidence that is "competent, material and relevant" may be admitted (FCA, § 342.2[1]), and any determination that the child did the act or acts complained of must be based upon proof beyond a reasonable doubt. FCA, § 342.2(2).

Following a finding that the child committed the alleged acts, the Court must hold a dispositional hearing, the purpose of which is to determine whether the child requires supervision, treatment or confinement. FCA, § 352.1(1). If the child is detained, the hearing must commence within

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[20] If the act involved is a class A, B or C felony, and the child is in detention, the fact-finding hearing may commence no later than 14 days after the conclusion of the initial appearance. FCA, § 340.1(1).

If the child is in detention, the hearing may be adjourned on the Court's own motion or on the motion of the presentment agency "for good cause shown" for not more than three days. FCA, § 340.1(3)(a). On the child's motion, the hearing may be adjourned "for good cause shown" for not more than 30 days. FCA, § 340.1(3)(b). The Court must state on the record the reason for any adjournment. FCA, § 340.1(4).

10 days of the finding.[21] FCA, § 350.1(1). Only evidence that is material and relevant may be admitted, and an adjudication must be based on a preponderance of the evidence. FCA, § 350.3(1, 2). If, at the conclusion of the hearing, the Court determines that the child does not require supervision, treatment or confinement, the petition is dismissed. FCA, § 352.1(2). Upon a finding that supervision, treatment or confinement is necessary, an adjudication of juvenile delinquency is made, and the Court enters an appropriate order of disposition. FCA, § 352.1(1). In determining an appropriate disposition, the Court is required to order "the least restrictive available [statutory] alternative ... which is consistent with the needs and best interests of the respondent and the need for the protection of the community". FCA, § 352.2(2). Dispositions include conditional discharge, probation and placement. FCA, § 352.2(1); *see* FCA, §§ 353.1 *et seq.* The final order must state the Court's reasons for the particular disposition. FCA, § 352.2(3).[22]

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[21] The dispositional hearing may be adjourned on the Court's motion or on the motion of the presentment agency "for good cause shown" for not more than 10 days (FCA, § 350.1[3][a]); on the child's motion, the hearing may be adjourned "for good cause shown" for not more than 30 days. FCA § 350.1(3)(b). The Court must state on the record the reasons for any adjournments. FCA, §350.1(4).

[22] Throughout the sections referred to, the Family Court Act makes special provisions for "designated felony acts", *i.e.*, acts which, if done by an adult, would constitute certain designated serious crimes, *e.g.*, murder, kidnapping, arson. FCA, § 301.2(8).

Summary of Argument

I

The appeal is not moot. Although the pretrial detentions of the named petitioners have ended, the reasoning of this Court in *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975), is equally applicable here and supports the proposition that "[t]his case belongs ... to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of unnamed members of the class". *Id.*

Nor has the amendment of the Family Court Act, enacted subsequent to the determinations of the Courts below and noted in appellant Schall's jurisdictional statement, mooted the appeal. The new Article 3 governing juvenile delinquency proceedings provides in section 320.5(3)(b) for pretrial detention under a standard identical to that in former section 739(a)(ii), the section originally challenged by petitioners. While some changes have been made in the procedures which precede and follow the detention hearing, the petitioner class is subject to the same detention procedures under the Family Court Act as amended as it was under the sections formerly applicable. *See Brockington* v. *Rhodes*, 396 U.S. 41, 41-43 (1969).

II

With respect to juveniles, the objectives of ensuring the safety of the community and protecting it from crime justify the utilization of pretrial detention. So long as a statute contains safeguards to protect the obvious liberty interest of the potential detainee, the Constitution is sufficiently flexible to incorporate a community's legitimate

concern for its safety and well-being. Section 320.5(3)(b) of the New York Family Court Act does not violate the Due Process Clause of the Fourteenth Amendment.

A.1. Section 320.5(3)(b) cannot be held violative of due process on the ground that it is necessarily premised on a prediction of future criminal behavior. This Court has consistently rejected the argument that utilization of such a prediction is *per se* unconstitutional. Last term, this Court reiterated that "the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty". *Barefoot* v. *Estelle*, — U.S. —, 51 U.S.L.W. 5189, 5194 (June 28, 1983), *citing Jurek* v. *Texas*, 428 U.S. 262 (1976).

"[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." *Jurek* v. *Texas*, *id.*, 428 U.S. at 275; *see, e.g., Carbo* v. *United States*, 82 S. Ct. 662, 666, 7 L. Ed. 2d 769 (1962) (Douglas, Circuit Justice) (prediction of dangerousness as basis for denying bail pending appeal); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 8 (1979) (decision to parole an inmate involves a predictive judgment as to what is best for individual and community).

In light of these considerations, two courts have explicitly rejected arguments that the predictive nature of the preventive detention decision is violative of due process. *United States* v. *Edwards*, 430 A. 2d 1321 (D.C. App. 1981) (*en banc*), *cert. denied*, 455 U.S. 1022 (1982); *People ex rel. Wayburn* (*Charles L.*) v. *Schupf*, 39 NY 2d 682, 385 N.Y.S. 2d 518, 350 N.E. 2d 906 (1976) (sustaining constitutionality of predecessor of section 320.5[3][b] as against a due process challenge substantially identical to that of petitioners herein).

2. While the predictive decisional process necessitated by section 320.5(3)(b) affects a substantial liberty interest of the juvenile involved which is entitled to the protection of the Due Process Clause, the Family Court Act prescribes procedures which are "fundamentally fair" and which preclude arbitrary action by Family Court judges applying section 320.5(3)(b).

None of the substantive deficiencies in the section noted by the Courts below are of constitutional dimension. The fact that the section does not place limits on the crimes which initially subject a juvenile to detention does not violate due process. There being nothing in the record to support the proposition that some crimes are more or less predictive of future criminal behavior than others, the question whether to so limit the categories of crimes is a legislative, rather than a constitutional, judgment.

Similarly, nothing in the record or the decisions below suggests how limiting potential crimes to felonies or violent crimes would in any manner minimize the risk of an incorrect prediction. We contend that the decision regarding the nature of the future crimes from which the community is to be protected is a legislative judgment which does not implicate fundamental fairness.

In requiring a statement of facts and reasons supporting a decision to detain, section 320.5(3)(b) fully provides the process which is due. *Cf. Kent* v. *United States*, 383 U.S. 541, 561 (1966). The record demonstrates that, in light of that requirement, Family Court judges assess a number of factors, including the nature of the crime charged and the probability the juvenile committed it; the juvenile's relationship with his parents; and, the juvenile's prior court contacts. So far from being an unprincipled guess, the determination of the judge to detain is premised on such information about the child as can reasonably be obtained prior to the detention hearing.

Although the Family Court Act does not require a finding of probable cause to be made contemporaneously with the detention decision, the procedures established by the statute are consistent with *Gerstein* v. *Pugh, supra,* 420 U.S. 103, and consonant with the dictates of due process. The non-hearsay allegations of the verified petition must establish reasonable cause. In any event, the requirement of the Act that a probable cause hearing be held within three days of detention (plus one extension of three court days "[f]or good cause shown") accords the juvenile the fundamental fairness which is due. *See Cooley* v. *Stone,* 414 F. 2d 1213 (D.C. Cir. 1969).

B. Both the legislative history of the predecessors to section 320.5(3)(b) and the statutory scheme of Article 3 support the conclusion that the section is reasonably related to the legitimate governmental function of protecting the community. Such a function is an "alternative purpose" sufficient to qualify section 320.5(3)(b) as a regulatory, rather than penal, measure wholly consistent with due process constraints. *See United States* v. *Edwards, supra,* 430 A. 2d at 1331-33, *cert. denied,* 455 U.S. 1022.

The record does not support the conclusion of the Court of Appeals that most detainees will either not be adjudicated guilty or will not be sentenced to confinement after adjudication of guilt. Even assuming, however, that a majority of detained juveniles will not be "placed" following a dispositional hearing, detention pursuant to section 320.5 (3)(b) is not thereby rendered punitive. In light of the broad range of dispositions available to Family Court judges and the additional information available at disposition, including information predicated on the detention period itself, dispositions less restrictive than placement do not call into question the initial assessment of dangerousness.

C. Section 320.5(3)(b) recognizes the need for preventive detention in order to provide for the protection of the community and does so with due regard for fundamental fairness and the rights of the juveniles involved.

ARGUMENT

Section 320.5(3)(b) of the New York Family Court Act, which authorizes the pretrial detention of a juvenile upon the Family Court's statement of facts and reasons for finding that, unless the juvenile is detained, there is a serious risk that he may, before the return date of the fact-finding hearing, commit an act which, if committed by an adult, would constitute a crime, comports with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

I

Initially, we respectfully urge that, while two circumstances might lead this Court to consider the question of mootness, this appeal should be determined on the merits. First, although the pretrial detentions of the named petitioners have ended, the conclusion of this Court in *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n. 11 (1975), is equally applicable here and precludes a finding of mootness:

> "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional pro-

> cedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'"

See United States v. *Edwards,* 430 A. 2d 1321, 1324 n.2 (D.C. App. 1981) (*en banc*), *cert. denied,* 455 U.S. 1022 (1982). Also, the District Court's class certification militates against a finding that the proceeding is moot. *See Sosna* v. *Iowa,* 419 U.S. 393, 397-403 (1975). Indeed, although two of the named petitioners, Rosario and Morgan, were, in fact, in pretrial detention at the time of the certification on April 3, 1978, such a showing is not necessary to avoid mootness. *Gerstein* v. *Pugh, supra,* 420 U.S. at 111 n.11; *see United States Parole Commission* v. *Geraghty,* 445 U.S. 388, 399-40 (1980).[23]

Second, the amendment of the New York Family Court Act, substituting a new Article 3 to govern juvenile delinquency proceedings in place of former Article 7, has not mooted the appeal.[24] Pursuant to FCA, section 320.5 (3)(b), juveniles are presently subject to pretrial detention under a standard identical to that in former section 739(a)(ii), the section originally challenged by petitioners. That is, at the same stage of the process, subsequent to the filing of the petition and prior to the fact-finding hearing, juveniles continue to be subject to de-

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[23] As noted, the District Court intended its writ to reach "all detained juveniles held under the relevant act until this proceeding is concluded or the judgment entered is reversed". Commissioner Schall continues to release any juvenile remanded into her custody pursuant to FCA, section 320.5(3)(b).

[24] The new statute, which was signed by the Governor of the State of New York on December 20, 1982, subsequent to the determinations of the Courts below, was noted in Commissioner Schall's jurisdictional statement (pp. 21-22 n.). The statute became effective July 1, 1983.

tention upon the Family Court's stated facts and reasons for finding that, in the absence of detention, "there is a serious risk that [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime". Thus, while this Court must "review the judgment below in light of the . . . statute as it now stands, not as it once did" (*Hall* v. *Beals,* 396 U.S. 45, 48 [1969]), the statute has not been so "substantially amended" (*Princeton University* v. *Schmid,* 455 U.S. 100, 103 [1982]) as to moot the appeal. Under all of the circumstances, the case has clearly not "lost its character as a present, live controversy of the kind which must exist if [this Court is] to avoid advisory opinions on abstract propositions of law". *Hall* v. *Beals, supra,* 396 U.S. at 48. Unlike the situation in *Hall,* in which voters disenfranchised because of a residence requirement would not have suffered the same fate under the amended statute, the petitioner class herein is subject to the same detention procedures under the Family Court Act as amended as it was under the sections formerly applicable. *See Brockington* v. *Rhodes,* 396 U.S. 41, 41-43 (1969); *cf. Bell* v. *Wolfish,* 441 U.S. 520, 550 n.31 (1979).

II

In *Bell* v. *Wolfish,* 441 U.S. 520, 534 n.15 (1979), this Court left open the question whether any governmental objective other than ensuring a detainee's presence at trial may constitutionally justify pretrial detention. In partial response, we contend that with respect to juveniles, the objectives of ensuring the safety of the community and protecting it from crime justify the utilization of pretrial detention. "[O]ur common law and constitutional heritage has refused to abjure the institution of pretrial

detention. . . . '[T]he State's duty to control crime' . . . justifies in the first instance the institution of pretrial detention." *Campbell* v. *McGruder*, 580 F.2d 521, 527, 528 (D.C. Cir. 1978). So long as a statute is tailored with safeguards to protect the obvious liberty interest of the potential detainee, the Constitution is sufficiently flexible to incorporate a community's legitimate concern for its safety and well-being. "[T]he sharp increase in crime and a desire to compensate for a seeming progressive breakdown of our law enforcement structure" (*State* v. *Johnson*, 61 N.J. 351, 294 A. 2d 245, 250 [1972]) are realities which are not ignored by the Constitution. *L.O.W.* v. *District Court*, 623 P. 2d 1253 (Colo. 1981) (child may be detained if it is "contrary to the welfare . . . of the community to release the child from detention"); *Morris* v. *D'Amario*, 416 A. 2d 137 (R.I. 1980) (child can be removed from parents "when . . . the safety and protection of the public cannot be adequately safeguarded without his removal"); *People ex rel. Wayburn* (*Charles L.*) v. *Schupf*, 39 NY 2d 682, 385 N.Y.S. 2d 518, 350 N.E. 2d 906 (1976) (predecessor to FCA, section 320.5[3][b], held not to be violative of due process); *see United States ex rel. Covington* v. *Coparo*, 297 F. Supp. 203, 207 (S.D.N.Y. 1969) (writ of habeas corpus denied on ground State court reasonably found, *inter alia*, that the petitioner's release pending trial might constitute a danger to the community); *Parker* v. *Roth*, 202 Neb. 850, 278 N.W. 2d 106, *cert. denied*, 444 U.S. 920 (1979) (sustaining validity of State constitutional provision denying bail in cases of " 'sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption great' ").

Embodying the concept of preventive detention, section 320.5(3)(b) of the New York Family Court Act permits a Family Court judge to detain a juvenile, for a very

limited period, upon stated facts and reasons for finding that, in the absence of detention, there is a serious risk that the juvenile may, before the return date of the fact-finding hearing, commit an act which, if committed by an adult, would constitute a crime. We submit that this section does not violate the Due Process Clause of the Fourteenth Amendment.[25] In Part A herein we argue first that the section is not unconstitutional by virtue of the fact that it is premised on a prediction of future criminal conduct, and second that it embodies fundamentally fair procedures and thereby provides the process which is due under the circumstances. In Part B, we demonstrate that pretrial detention pursuant to the section is a regulatory rather than penal measure and, therefore, that it does not authorize punishment prior to an adjudication of guilt.

(A)

(1)

Inherent in the concept of preventive detention is the necessity for a court to predict whether a particular person will, in the future, engage in criminal conduct. The District Court concluded (JA: 69-83) that since "no

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[25] As noted, petitioners' equal protection claim, rejected by the District Court, was neither raised in, nor decided by, the Court of Appeals. On this appeal, therefore, we do not address the issues, if any, raised by the fact that although New York does not provide for preventive detention of adults, FCA, section 320.5(3)(b), authorizes such detention of juveniles. *See People ex rel. Wayburn (Charles L.)* v. *Schupf, supra,* 385 N.Y.S. 2d at 520-521, 350 N.E. 2d at 908-910 (former section 739[a][ii] does not violate the Equal Protection Clause of the Fourteenth Amendment).

reliable method of predicting dangerousness . . . exists at this time . . . [,] the family court judge's opinion . . . is also unreliable" (JA: 80). However, in light of this Court's consistent rejection of the argument that utilization of a prediction of crime is *per se* unconstitutional, section 320.5(3)(b) cannot be held invalid on the ground that it is premised on predictions of future criminal behavior.

Citing *Jurek* v. *Texas*, 428 U.S. 262 (1976), this Court reiterated last term that "the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty". *Barefoot* v. *Estelle*, —— U.S. ——, 51 U.S.L.W. 5189, 5194 (June 28, 1983). In *Jurek*, this Court sustained the constitutionality of the Texas capital punishment statute. Texas law requires that, if a defendant has been convicted of a capital offense, the trial court is required to conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. After presentation of evidence and argument, the jury is required to consider two, and sometimes three, questions, the answers to which determine whether a death sentence is to be imposed. 428 U.S. at 267. In relevant part, the jury is required to determine "'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' if he were not sentenced to death". 428 U.S. at 272. In response to the petitioner's contention that "it [was] impossible to predict future behavior and that the question was so vague as to be meaningless" (428 U.S. at 274), the joint opinion stated (428 at 274-76):

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal con-

> duct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." (footnotes omitted)

In so stating, this Court was aware that "some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts". *Estelle* v. *Smith*, 451 U.S. 454, 472 (1981). The result, however, was not to find an infirmity in the statute, but, rather, to recognize "that the inquiry mandated by Texas law does not require resort to medical experts". 451 U.S. at 473. Thus, as a Texas jury may make up its own mind about future dangerousness, based on lay testimony (*see Barefoot* v. *Estelle, supra*, 51 U.S.L.W. at 5194), so a Family Court judge in New York may determine, on the basis of the information adduced at the initial appearance (see, *infra*, p. 37), whether there is a "serious risk" of future crime.[26]

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[26] This Court did not preclude the utilization of expert psychiatric testimony to aid the Texas jury in determining the ques-

(Footnote continued on following page)

A prediction that a person poses a danger to the community can serve as a basis for denying bail pending appeal. *See Carbo* v. *United States,* 82 S. Ct. 662, 666, 7 L. Ed. 2d 769 (1962) (Douglas, Circuit Justice); *Leigh* v. *United States,* 82 S. Ct. 994, 996, 8 L. Ed. 2d 269 (1962) (Warren, C.J.); 18 U.S.C., § 3148. *But see, Williamson* v. *United States,* 184 F. 2d 280 (2d Cir. 1950) (Jackson, Circuit Justice). Further, as this Court has explicitly recognized, predicting dangerous behavior is a necessary component of parole decisions. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1, 8 (1979) (The decision to parole an inmate "involves a synthesis of record facts and personal observations filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community."); *Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972) (Parole revocation involves decisionmaking which "is not purely factual but also predictive and discretionary".); *see Connecticut Board of Pardons* v. *Dumschat,* 452 U.S. 458, 464 (1981) (Holding that an inmate has no constitutional or inherent right to commutation of his sentence, this Court noted that the decision to commute a long-term sentence generally depends not simply on objective fact finding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision.).

(Footnote continued from preceding page)

tion of future dangerousness. In *Barefoot* v. *Estelle, supra,* 51 U.S.L.W. at 5194-96, this Court rejected the contention that the use of such testimony at the punishment hearing was barred by the Constitution. The Court was "not persuaded that such testimony is almost always unreliable". 51 U.S.L.W. at 5195. Professional doubts about the usefulness of psychiatric predictions can be called to the attention of the fact-finder, trusting the adversary process "to sort out the reliable from the unreliable evidence and opinion about future dangerousness".

We note, too, that a determination that an accused may not appear for trial is recognized as a basis for denying bail. *People ex rel. Weisenfeld (Cifone)* v. *Warden*, 37 NY 2d 760, 374 N.Y.S. 2d 631, 337 N.E. 2d 140 (1975); *see Bell* v. *Wolfish, supra*, 441 U.S. at 534 ("Neither respondents nor the courts below question that the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt. . . . Nor do they doubt that the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest.").[27] The prediction of future crime, we submit, cannot be said to be any more or less speculative than a prediction of flight.

These considerations have lead two courts explicitly to reject arguments that the predictive nature of the preventive detention decision is violative of due process. Citing statistical studies concluding that criminal conduct cannot be predicted, the appellant in *United States* v. *Edwards, supra*, 430 A. 2d 1321, *cert. denied*, 455 U.S. 1022, contended that the District of Columbia statute which authorizes the preventive detention of adult alleged offenders for a maximum of 60 calendar days (see, D.C. Code Ann., § 23-1322[d][2][A] [1981])[27a] was impermis-

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[27] As noted, petitioners have not challenged FCA, section 320.5 (3)(a) (formerly, section 739[a][i]), which permits the Family Court to detain a juvenile upon a finding that "there is a substantial probability that [the juvenile] will not appear in court on the return date."

[27a] Upon the prosecutor's application, a person may be detained for an additional period not to exceed 30 days "on the basis of good cause shown" and "only for the additional time required to prepare for the expedited trial of such person". D.C. Code Ann., § 23-1322(d)(4) (1981) (1983 Cum. Supp.).

sibly overbroad. In sustaining the constitutionality of the statute, the Court responded (430 A. 2d at 1342):

> "Prediction of the likelihood of certain conduct necessarily involves a margin of error, but is an established component of our pretrial release system. Trial judges have been engaged in predicting the likelihood of flight for all defendants, capital and noncapital, and have predicted the likelihood of recidivism for capital offenses since the Judiciary Act of 1789. . . . Appellant's argument relies on the assumptions, which we do not share, that the judicial prediction of dangerousness, as distinguished from the prediction of likelihood of flight, is both a denial of a fundamental right and the imposition of punishment."

Similarly, in a habeas corpus proceeding, the Court of Appeals of the State of New York sustained the constitutionality of the predecessor of FCA, section 320.5 (3)(b), as against a due process challenge substantially identical to that of petitioners herein. *People ex rel. Wayburn (Charles L.)* v. *Schupf, supra,* 39 NY 2d 682, 385 N.Y.S. 2d 518, 350 N.E. 2d 906.[28] In so doing, the Court refused to accept the petitioner's argument that since the degree of probability of repetition of criminal behavior cannot be predicted with precision, there is necessarily involved an unconstitutional element of vagueness or speculation. The Court stated (385 N.Y.S. 2d at 522, 350 N.E. 2d at 910):

> "Such an element is necessarily present in the administration of any bail system, in the imposition of alternatively available sentences, in the adminis-

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[28] No appeal was taken to this Court from the order of the Court of Appeals. See 28 U.S.C., § 1257(2).

tration of a parole system, or in any other procedure in which discretionary authority for differing criminal dispositions is vested in a court or an administrative body."

It is difficult to imagine the functioning of the criminal justice system without the element of prediction in judicial and administrative decisionmaking. Decisions about bail, sentencing and parole have been found to be consistent with due process despite the facts that they affect individual liberty to a greater or lesser degree; that they are prospective in that they assess future risks; that they may in some measure be characterized as subjective; and that they have the potential to result in varying outcomes in similar cases.[29] We submit, therefore, that a decision to detain pursuant to FCA, section 320.5(3)(b), cannot be held to violate the Due Process Clause of the Fourteenth Amendment on the ground that it is necessarily premised on a prediction of future criminal conduct.

(2)

Having established that the utilization of predictive judgments of criminal behavior is not *per se* unconstitutional, we do not dispute that the predictive decisional process necessitated by FCA, section 320.5(3)(b), affects a liberty interest of the juvenile involved which is entitled to the protection of the Due Process Clause of the

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[29] "Acceptance of [the] position that expert testimony about future dangerousness is far too unreliable to be admissable [sic.] [at a sentencing hearing to determine whether the death penalty should be imposed] would immediately call in question those other contexts in which predictions of future behavior are constantly made." *Barefoot* v. *Estelle, supra,* 51 U.S.L.W. at 5194.

Fourteenth Amendment. *See United States* v. *Edwards, supra,* 430 A. 2d at 1333-34, *cert. denied,* 455 U.S. 1022. It is our contention that the Family Court Act prescribes procedures which are "fundamentally fair" (*Lassiter* v. *Department of Social Services,* 452 U.S. 18, 24-25 [1981]; *Gagnon* v. *Scarpelli,* 411 U.S. 778, 790 [1973]; *McKeiver* v. *Pennsylvania,* 403 U.S. 528, 543 [1971]) and which preclude arbitrary action by Family Court judges applying section 320.5(3)(b).

"[D]ue process 'is flexible and calls for such protections as the particular situation demands.'" *Greenholtz* v. *Nebraska Penal Inmates, supra,* 442 U.S. at 12. In determining "what process is due" (*Morrissey* v. *Brewer, supra,* 408 U.S. at 481), the Court is required to balance three factors: the private interest at stake, the countervailing governmental interest supporting use of the challenged procedures, and the risk that the procedures chosen will lead to an erroneous decision. *Santosky* v. *Kramer,* 455 U.S. 745, 754 (1982); *Lassiter* v. *Department of Social Services, supra,* 452 U.S. at 27; *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976). In the instant case, the private interest involved, unfettered liberty prior to an adjudication of guilt, and the countervailing governmental interests, preserving the community and protecting it from danger pursuant to "a simplified yet fair" hearing (*United States* v. *Edwards, supra,* 430 A. 2d at 1336), are readily ascertainable and equally significant. Focusing, then, on the third factor, we submit that it has not been demonstrated that the procedures prescribed by the New York Legislature are not fair or that different or additional procedures would reduce the risk of an erroneous depri-

vation of liberty. *See Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982).[30]

With respect to minimizing the risk of error, none of the substantive deficiencies in former section 739(a)(ii) (and, necessarily, in current section 320.5[3][b]) noted by the majority and concurring opinions in the Court of Appeals are of constitutional dimension. The concurring opinion suggests that the section ought to "[place] . . . limits on the crimes for which the person subject to detention has been arrested" (JA: 121). There is nothing in the record or the opinion to support the proposition that some crimes are more or less predictive of

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[30] Petitioners appropriately do not contend that the statute lacks the traditional due process requirements of notice and a hearing. The petition which commences a juvenile delinquency proceeding must contain, *inter alia*, "a plain and concise factual statement in each count which ... asserts facts supporting every element of the crime charged and the respondent's commission thereof, with sufficient precision to clearly apprise the respondent of the conduct which is the subject of the accusation". FCA, § 311.1(3)(h). Also, the petition, together with any supporting depositions, must provide reasonable cause to believe that the juvenile committed the crime charged; non-hearsay allegations of the petition and any supporting depositions must establish, if true, every element of the crime charged. FCA, § 311.2. The juvenile is further apprised by the statute that his previous delinquency findings entered by the Family Court may be introduced for the purpose of determining whether he ought to be released or detained. FCA § 320.5(4). The detention decision is made at the initial appearance, and the hearing that is held is clearly adequate to meet the demands of procedural due process. We note also that the juvenile and his parents must be informed of the juvenile's right to remain silent and of his right to be represented by independent counsel or by a law guardian assigned by the Court. FCA, § 320.2(3).

future criminal behavior than others.[31] Limiting the categories of juveniles subject to preventive detention to those who commit "violent" or "dangerous" crimes may reduce the number of those detained,[32] but that, we submit, is a legislative, rather than a constitutional, judgment. The factors upon which a Family Court judge bases a determination to detain (see, *infra*, p. 37) are equally applicable to "minor" and "major" crimes alike.

The majority noted that the section does not limit the potential crimes "to felonies or violent crimes but include[s] every act which constitutes a crime under the New York Penal Law" (JA: 101; see also, concurring opinion at JA: 121). Again, the Court does not suggest any explanation, and none is apparent, as to how so limiting the section would in any manner minimize the risk of an incorrect prediction. Indeed, one of petitioners' expert witnesses, Professor Leslie Wilkins, a criminologist and statistician, testified that predictions of "serious

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[31] Speculation might lead one to surmise that a juvenile would be more likely to repeat "minor" criminal acts than he would "major" crimes.

[32] Pursuant to the District of Columbia preventive detention statute sustained in *United States* v. *Edwards*, *supra*, 430 A. 2d 1321, *cert. denied*, 455 U.S. 1022, the only persons subject to detention are those charged with a "dangerous crime" or a "crime of violence", as defined by the statute, and those charged with any offense who, "for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror". D.C. Code Ann., §§ 23-1322(a), 23-1331(3, 4) (1981). It has been noted that, nonetheless, the statute encompasses two-thirds of those persons charged with crime in the District, including those with no prior criminal convictions. P.D. Borman, *The Selling of Preventive Detention 1970*, 65 Nw. U. L. Rev. 879, 926-27 (1971).

crimes" or "crimes of violence" are "a lot worse" than predictions of crime generally (JA: 199). In light of this, we submit that, as with the decision regarding what crimes will initially subject a juvenile to detention, the decision regarding the nature of the future crimes from which the community is to be protected is a legislative judgment which does not implicate fundamental fairness. *Cf. United States* v. *Edwards, supra,* 430 A. 2d at 1341, *cert. denied,* 455 U.S. 1022. Having determined that a particular act is criminal in nature, the legislature may conclude that the community is entitled to be protected from it no matter how "minor" one may choose to classify it.[33]

The majority also noted that section 320.5(3)(b) lacked "substantive criteria . . ., such as prior court contacts or lack of family supervision, to limit which accused juveniles may be detained" (JA: 102; see also, concurring opinion at JA: 121: "the judge is not required to assess the individual's background"). In so stating, however, the Court wholly ignored the statutory requirement that the judge must state the "facts and reasons" supporting a decision to detain. The purpose of this requirement is to improve judicial decisionmaking "while providing a basis for review of the individual case, guid-

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[33] The District of Columbia statute provides for pretrial detention upon a finding, *inter alia,* that "there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community". D.C. Code Ann., § 23-1322(b)(2)(B) (1981). Although commentators at the time of the statute's enactment argued that it lacked guidelines delineating the type of behavior from which the community is to be protected (see P.D. Borman, *The Selling of Preventive Detention 1970, supra,* 65 Nw U. L. Rev. at 892), the constitutionality of the statute was nonetheless sustained.

ance for others who will later deal with the child, and legislative review of detention practices". S. K. Barsky and R. N. Gottfried, Practice Commentary to Section 739, Book 29A, Part 1, McKinney's Con. Laws of N.Y. (Supp. Pamphlet 1976-1978), p. 369. The obligation of the Family Court judge to justify the decision to detain provides the process which is due under the circumstances. *Cf. Morrissey* v. *Brewer, supra,* 408 U.S. at 489 (parole revocation necessitates, *inter alia,* "a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole"); *Kent* v. *United States,* 383 U.S. 541, 556, 561 (1966) (waiver of jurisdiction by a juvenile court, "a 'critically important' action determining vitally important statutory rights of the juvenile," held to require, *inter alia,* "a statement of reasons or considerations therefor").[34]

As to the factors utilized in determining whether release or detention is appropriate in a particular case, a judge of the New York Family Court testified at trial

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[34] We note that the concurring opinion in the Court of Appeals erred in concluding that the District of Columbia preventive detention statute provides a "standard of proof" by which the judge is to determine dangerousness (JA: 122). In fact, that statute is analogous to section 320.5(3)(b) in this regard; it requires that the Court issue written findings of fact and the reasons for finding that "there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community". D.C. Code Ann., § 23-1322(b)(2)(B), (b)(3) (1981); *see Morris* v. *D'Amario, supra,* 416 A. 2d at 141-42 ("If the court determines that detention . . . will best serve the interests of the child and the community, it must articulate in writing the facts and reasons on which it based its decision to detain the juvenile."); *Doe* v. *State,* 487 P. 2d 47, 53 (Alaska 1971) (Due process requires at the very least . . . that the detention order state with particularity the facts supporting it.").

that he and his colleagues consider the following (JA: 263-67): the seriousness of the acts alleged in the petition; an evaluation of the probability that the allegations will be sustained; the age of the victim; the time of day of the acts, indicating, perhaps, a lack of parental control; the juvenile's past record and the proximity in time of the present alleged acts to prior acts; and any information developed at the hearing.[35] Moreover, a parent accompanying the child may be questioned regarding the behavior of the child at home, the relationship between the parent and child, etc. (JA: 257). If a clergyman or social worker accompanies the child, he may be given an opportunity to speak on the child's behalf (JA: 257). Finally, probation, which interviewed the child and others prior to the filing of the petition, makes a recommendation as to whether the child ought to be released or detained (JA: 254).[36] As so interpreted (*cf. Jurek* v.

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[35] These factors correspond closely to the matters to be "take[n] into account" by the judicial officer making a determination under the District of Columbia preventive detention statute. D.C. Code Ann., §§ 23-1321(b), 23-1322(b)(2)(B) (1981).

[36] This process ensures that the detention decision is made on an individual basis, supported, as required by FCA, section 320.5(3), by judicially reviewable stated facts and reasons. *Cf. Huihui* v. *Shimoda*, 644 P. 2d 968 (Ha. 1982) (denial of bail to particular class of offenders creates a conclusive presumption of dangerousness and thus violates State constitutional right to bail); *In re William M.*, 3 Cal. 3d 16, 89 Cal. Rptr. 33, 473 P. 2d 737 (1970) (judicial decision to detain on grounds of dangerousness premised solely on act committed, without regard to individual factors involved, denies due process). *Compare Parker* v. *Roth*, 202 Neb. 850, 278 N.W. 2d 106, *cert. denied*, 444 U.S. 920 (1979) (State constitutional provision denying bail

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Texas, supra, 428 U.S. at 272-73 [relying on judicial construction of terms "criminal acts of violence" and "continuing threat to society" in statute defining when jury may impose death penalty]), section 320.5(3)(b) clearly does not embody the inadequacy noted by the Court of Appeals.[37] So far from being an unprincipled guess, the determination of the Family Court judge to detain is premised on such information about the child as can reasonably be obtained prior to the detention hearing.

Finally, the District Court held (JA: 86-88), and the concurring opinion in the Court of Appeals suggests (JA: 121), that section 320.5(3) is constitutionally infirm because it does not provide for a contemporaneous finding of probable cause that a crime has been committed and that the juvenile committed it. We do not contend that a juvenile may be detained in the absence of a finding

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in cases of "'sexual offenses involving penetration by force or against the will of the victim ... where the proof is evident or the presumption great'" held valid and proper in all respects) *with Hunt* v. *Roth,* 648 F. 2d 1148 (8th Cir. 1981), *vacated as moot sub. nom. Murphy* v. *Hunt,* 455 U.S. 478 (1982) (same statute held violative of Eighth Amendment proscription against excessive bail).

[37] The determination of the District Court in this regard must also be rejected. The Court concluded that predictive decisions regarding bail, sentencing, parole and imposition of the death penalty are distinguishable from the detention decisions pursuant to FCA, section 320.5(3)(b), since, according to the Court, the former decisions are made on the basis of background information about the person involved, whereas "[t]he family court judge in making a [detention] decision knows nothing about the juvenile if he is a first time offender" (JA: 82). Even if the child has had prior court contact, the judge "must operate on intuition and personal predilections, the antithesis of reasoned action" (JA: 83).

of probable cause. *Compare Morris* v. *D'Amario, supra,* 416 A. 2d at 142 ("[W]e reject [the] argument that juveniles facing prehearing detention must be afforded a probable-cause hearing."), *with Moss* v. *Weaver,* 525 F. 2d 1258, 1260 (5th Cir. 1976) ("Pretrial detention is an onerous experience, especially for juveniles, and the Constitution is affronted when this burden is imposed without adequate assurance that the accused has in fact committed the alleged crime."). We do submit, however, that the procedure established by the Family Court Act is consistent with *Gerstein* v. *Pugh, supra,* 420 U.S. 103, and consonant with the dictates of due process.

First, as we have noted, the Act requires that the petition, which is required to be verified (FCA, § 311.1[4]), together with any supporting depositions, must provide reasonable cause to believe the child committed the crime charged. Also, the "non-hearsay allegations of the factual part of the petition or of any supporting depositions [must] establish, if true, every element of each crime charged and the respondent's commission thereof". FCA, § 311.2 (2, 3). Given this Court's determination that a probable cause hearing may be an informal, nonadversary proceeding on hearsay and written testimony, without confrontation and cross-examination (*Gerstein* v. *Pugh, id.,* 420 U.S. at 119-23), it is clear that, at the initial appearance, a Family Court judge could find that probable cause exists. That he is not required to do so does not, under the circumstances, amount to a deprivation of due process.

In any event, the requirement of the Family Court Act that the probable cause hearing be held "within three days following the initial appearance or within four days following the filing of a petition, whichever occurs sooner"

(FCA, § 325.1[2])[38] conforms to the holding of *Gerstein* that a probable cause hearing is a "prerequisite to extended restraint of liberty following arrest". *Gerstein* v. *Pugh*, *id.*, 420 U.S. at 114; *see Cooley* v. *Stone*, 414 F. 2d 1213 (D.C. Cir. 1969) (detention hearing held day after arrest and initial hearing held seven days later; court held that juvenile cannot be lawfully detained without prompt judicial determination of probable cause, which must be made at least by the time of the initial appearance). In this regard, we note that the probable cause hearing mandated by the Family Court Act is a considerably more formal proceeding than that authorized in *Gerstein*. The child has been informed of his right to remain silent and to be represented by counsel of his own choosing or by a law guardian appointed by the court. FCA, § 320.3. The presentment agency must first call and examine witnesses and offer evidence in support of the charge. The child may, as a matter of right, testify on his own behalf, and, except for good cause shown, he may call and examine witnesses and offer other evidence on his own behalf. If he does choose to testify, his testimony may be used only for impeachment purposes in subsequent proceedings. Every witness, unless authorized to give unsworn testimony at the fact-finding hearing, must testify under oath, and every witness, including the child, is subject to cross-examination. With limited statutory exceptions, only non-hearsay evidence is admissible. FCA, § 325.2.

In light of the above, and given this Court's recognition of "the desirability of flexibility and experimentation by the States" (*Gerstein* v. *Pugh*, *supra*, 420 U.S. at 123),

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[38] The Court may adjourn the hearing for no more than an additional three court days "[f]or good cause shown". FCA, § 325.1(3).

the statutory scheme of the Family Court Act, we submit, fully complies with the requirements of due process and accords the detained juvenile the fundamental fairn ss which is due.

(B)

The Courts below held, each on a different theory, that detention pursuant to FCA, section 320.5(3)(b), constitutes punishment before adjudication of guilt in violation of the Due Process Clause of the Fourteenth Amendment. We submit that the preventive detention authorized by the section is regulatory, rather than penal, in nature and, therefore, not violative of due process. *See Wong Wing* v. *United States,* 163 U.S. 228, 235 (1896).

"This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Bell* v. *Wolfish, supra,* 441 U.S. at 537. Applying the traditional tests to distinguish between penal and regulatory measures set forth in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 168-69 (1963) and restated in *Bell, supra,* 441 U.S. at 537-38, the Court in *United States* v. *Edwards, supra,* 430 A. 2d 1321, *cert. denied,* 455 U.S. 1022, concluded that the intention "to protect the safety of the community until it can be determined whether society may properly punish the defendant" (430 A. 2d at 1332) was an "alternative purpose" sufficient to qualify the preventive detention statute there in issue as a regulatory, rather than a penal, measure. 430 A. 2d at 1331-33.

The analysis of the Court in *Edwards* is equally applicable to FCA, section 320.5(3)(b). Both its history and the statutory scheme of Article 3 of the Family Court Act support the conclusion that it is a regulatory mea-

sure wholly consistent with due process constraints. The predecessor to section 320.5(3) was specifically "designed to avoid any routine detention of a child". Committee Comments to FCA, § 739, reprinted in Book 29A, McKinney's Con. Laws of N.Y., p. 619. "Excessive", "unnecessary" and "routine" detentions were to be curbed under the formulations of the Family Court Act. See Report of the Joint Legislative Committee on Court Reorganization, reprinted in 1962 McKinney's Session Laws of N.Y., p. 3438. The objective, then, of former section 739 was to ensure the detention only of those juveniles who posed a substantial risk of flight or a serious risk of danger. Such a measure is clearly regulatory, not penal, in intent: "[p]retrial detention to prevent repetition of dangerous acts . . . by incapacitating the detainee seeks to curtail reasonably predictable conduct, not to punish for prior acts." *United States* v. *Edwards, supra,* 430 A. 2d at 1332, *cert. denied,* 455 U.S. 1022.

The statutory scheme buttresses this conclusion. In light of the procedures mandated by the Family Court Act, which, as noted, include a verified, non-hearsay petition providing reasonable cause, and release if a probable cause hearing cannot be timely held or if probable cause is not found, preventive detention pursuant to section 320.5(3)(b) "is closely circumscribed so as not to go beyond the need to protect the safety of the community pending the detainee's trial". *United States* v. *Edwards, id.,* 430 A. 2d at 1333. Since the detention is "reasonably related to a legitimate governmental objective, it does not [therefore] amount to 'punishment' ". *Bell* v. *Wolfish, supra,* 441 U.S. at 539.

Choosing to ignore the analysis in *Kennedy* v. *Mendoza-Martinez, Bell* v. *Wolfish,* and *United States* v. *Edwards,* the Court of Appeals herein concluded that since

"in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt ... [,] the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard" (JA: 114). On that basis, former section 739(a)(ii) was held to be unconstitutional. The Court, we respectfully submit, erred in its analysis.

The brief of the Attorney General demonstrates that the record does not support the Court's determination that "the vast majority of juveniles detained under 739 (a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication" (JA: 103).[39] In any event, even assuming that a majority of preventively detained juveniles are not "placed" subsequent to a dispositional hearing, to conclude that detention under section 320.5(3)(b) is thereby unconstitutional is to misperceive the entire structure of Article 3 of the Family Court Act. As properly noted by the New York Court of Appeals in sustaining the immediate predecessor to section 320.5(3)(b) (*People ex rel. Wayburn [Charles L.] v. Schupf, supra,* 385 N.Y.S. 2d at 552, 350 N.E. 2d at 910):

> "[I]t must be apparent that there is a vastly different body of relevant data on which to make an informed determination as to the desirability of placement after the dispositional hearing. It should surprise no one that caution and concern for both the juvenile and society may indicate the more con-

[39] Judge Newman, concurring below, stated that he was "less certain than the majority that the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment" (JA: 117).

servative decision to detain at the very outset, whereas the later development of very much more relevant information may prove that while a finding of delinquency was warranted, placement would not be indicated."

Given the broad range of choices available to a Family Court judge at the dispositional phase (see, FCA, § 352.2[1]), we reject the conclusion that the brief pretrial detention period is punitive because a juvenile is subsequently discharged subject to conditions for a period of one year (FCA, § 353.1) or put on probation for two years (FCA, § 353.2). Such dispositions do not in any respect call into question an initial determination of dangerousness; they, in fact, reinforce it by requiring close supervision of the juvenile while also reflecting both possible changed circumstances (*e.g.*, demonstrated willingness to accept parental authority; exemplary behavior during detention) and the purposes and goals of the Family Court Act. That former detainees may not be placed following a dispositional hearing does not, therefore, mean that due process has been denied; it is evidence, rather, that at the dispositional phase the system is, in fact, working. Finally, the conclusion of the Court of Appeals that pretrial detention is punitive because of failures to prosecute ignores those situations where, for example, a complaining witness refuses to testify or a decision is made to prosecute on a different petition filed against the juvenile.[40]

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[40] The opinion of the Court of Appeals is also conceptually unsound insofar as it searches for "a compelling governmental interest" to justify "the imposition of sanctions ... before, rather than after, adjudication" (JA: 112). As the cited decisions of this

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The Court of Appeals erred in finding detention under FCA, section 320.5(3)(b), to be punishment preceding adjudication and, therefore, unconstitutional. The section, rather, serves the alternative purpose of protecting the community against reasonably predictable dangerous behavior, a regulatory function consistent with the Due Process Clause of the Fourteenth Amendment. *United States* v. *Edwards, supra,* 430 A. 2d at 1331-33, *cert. denied,* 455 U.S. 1022.[41]

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Court make clear, punishment which precedes adjudication is *per se* unconstitutional. We do not urge that this Court find a compelling reason to impose pre-adjudication punishment. Our argument, rather, is that, as envisioned by the New York Legislature and applied by the courts, section 320.5(3)(b) is a regulatory, not a penal, measure. *See generally Bell* v. *Wolfish, supra,* 441 U.S. at 531-40.

[41] The question as to whether juveniles have a constitutional right to bail was neither raised in nor decided by the Courts below. We therefore address the issue only briefly.

This Court has recognized that the prohibition against excessive bail in the Eighth Amendment of the United States Constitution has been assumed to have application to the states through the Fourteenth Amendment (*Schilb* v. *Kuebel,* 404 U.S. 357, 365 [1971]), and lower courts have so held. *E.g., Sistrunk* v. *Lyons,* 646 F. 2d 64, 71 (3rd Cir. 1981); *Pilkinton* v. *Circuit Court,* 324 F. 2d 45, 46 (8th Cir. 1963); *see Parker* v. *Roth,* 202 Neb. 850, 278 N.W. 2d 106, 110, *cert. denied,* 444 U.S. 920 (1979). It is generally held, however, that the prohibition against excessive bail does not include, by implication, an absolute right to bail in all non-capital cases. *United States* v. *Edwards, supra,* 430 A. 2d at 1325-1331; *Mastrian* v. *Heilman,* 326 F. 2d 708, 710-711 (8th Cir.), *cert. denied,* 376 U.S. 965 (1964); *United States ex rel. Hyde* v. *McMann,* 263 F. 2d 940, 943 (2d Cir.), *cert. denied sub. nom. United States ex rel. Hyde* v. *Lavallee,* 360 U.S. 937 (1959);

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(C)

We are not unmindful of the deleterious effects that pretrial detention may have on a juvenile, nor do we

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State v. *Norcross*, 26 Ariz. App. 115, 546 P. 2d 840, 842 (1976); *Bellamy* v. *Judges*, 41 AD 2d 196, 342 N.Y.S. 2d 137, 139 (1st Dept.), *aff'd*, 32 NY 2d 886, 346 N.Y.S. 2d 812, 300 N.E. 2d 153 (1973). *Contra Trimble* v. *Stone*, 187 F. Supp. 483 (D.D.C. 1960). The State may therefore provide bail in some cases and deny it in others. *United States ex rel. Covington* v. *Coparo*, 297 F. Supp. 203, 206 (S.D.N.Y. 1969); *Parker* v. *Roth*, *supra*, 278 N.W. 2d at 110-13. "If that is so, it logically follows that bail might constitutionally be kept out of an entire system." M. Guggenheim, *Paternalism, Prevention and Punishment: Pretrial Dentention of Juveniles*, 52 N.Y.U. L. Rev. 1064, 1081 (1977).

The bail provision of the New York Constitution (Art 1, § 5: "Excessive bail shall not be required ...") does not mandate release on bail in all cases; it is left to the Legislature to determine in what cases bail is to be allowed as of right and in what cases the grant or refusal of bail is confided to the sound discretion of the court. *People ex rel. Shapiro* v. *Keeper of City Prison*, 290 N.Y. 393, 49 N.E. 2d 498 (1943). Juveniles are not entitled to bail in Family Court proceedings. *People ex rel. Wayburn (Richard L.)* v. *Schupf*, 47 AD 2d 79, 365 N.Y.S. 2d 235, 238-239 (2d Dept. 1975); *Matter of Kenneth D.*, 102 Misc 2d 363, 423 N.Y.S. 2d 423, 426 (Fam. Ct., Kings Co. 1979); *see* M. Guggenheim, *Paternalism, Prevention and Punishment*, *supra*, 52 N.Y.U. L. Rev. at 1082 ("Beyond the general criticisms which can be leveled against bail, the use in juvenile systems would result in a substantial number of juveniles being detained simply because they cannot afford to post bail.").

We note also that "[v]irtually every court which has considered the issue has found that juvenile code safeguards obviate the need for a right to bail in juvenile pre-adjudication proceedings". *L.O.W.* v. *District Court*, *supra*, 623 P. 2d at 1258. New York juvenile justice procedures, as prescribed by the Family Court Act, are, we submit, no exception.

denigrate their significance. At least as equally important, however, is the right of the community to protect itself from criminal behavior. Such right justifies preventive detention in the first instance. As a judge of the New York Family Court testified at trial (JA: 598-99): "[I]n my experience in New York City, we do have situations where, if for no other reason but for the protection of the community, we must have some means in certain cases for detention." FCA, section 320.5(3)(b), which, as noted, "is designed to avoid any routine detention of a child", recognizes that need and does so with do regard for fundamental fairness and the rights of the juveniles involved.

CONCLUSION

The judgment appealed from should be reversed and the petition dismissed, with costs.

Respectfully submitted,

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